

Neutral Citation No: [2019] NIFam 5

Ref: KIN10909

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 13/03/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

RE S (DISCLOSURE TO THIRD PARTY)

HIS HONOUR JUDGE KINNEY

Sitting as a High Court Judge

Introduction

[1] Nothing must be reported in this case which would serve to identify the children who are the subject of these proceedings or any of the parties named therein.

[2] In this matter the Police Service of Northern Ireland (PSNI) has made an application for the release of two reports which were prepared in relation to proceedings involving the children of the family. A brief outline of the background is sufficient to provide the context for this application.

Background

[3] A is the mother and B is the father of four children aged between 15 and 8. The family came to the attention of Social Services some years ago. The children's names were placed on the Child Protection Register in October 2013 under the categories of potential emotional abuse and potential physical abuse. In December 2014 the children's names were also added under the category of potential sexual abuse. Concerns were raised about the children's home conditions including issues of domestic violence, alcohol misuse, neglect and the sexualised behaviour of some of the children.

[4] As a result of concerns relating to the family, two of the children, S and L, were referred to the Child Care Centre. Various matters were highlighted in relation to both children, including sexualised language and sexualised behaviour. The Child Care Centre carried out an investigation and furnished a report to the court dated 11 June 2018. The Child Care Centre is a specialist unit whose remit is the

investigation and treatment of child sexual abuse. Those working with the children are very experienced social workers with decades of experience in the areas of child protection and child abuse.

[5] The court had also directed an attachment and sibling relationship assessment report from Dr Ben Grey and Juliet Kesteven. Their report, dated 15 May 2018, was also provided to the court.

[6] Full care orders in relation to all four of the children were made by this court on 10 September 2018.

[7] After the Care Orders were made the matter returned to court. The PSNI sought the release of both the Child Care Centre report and Dr Grey's report to them. The application further requested that, if it was considered necessary by the PSNI, they could share the documents with the PPS and thereafter within the context of any criminal proceedings.

[8] The PSNI in their initial application indicated that their interest at that time was in a named third party, X. The mother had previously raised concerns about X with the PSNI. At that time the PSNI determined that there was insufficient evidence to proceed with an investigation. The PSNI now believe there is additional information contained in the Child Care Centre report which would potentially provide further relevant evidence and materially assist an investigation. The parties involved in the care proceedings are in general agreement to the release of redacted portions of the Child Care Centre report relating to X. The PSNI sought the totality of the Child Care Centre report.

Law

[9] The disclosure of documents held by the court is governed by rule 4.24 of the Family Proceedings Rules (Northern Ireland) 1996. The rule provides:

"4.24. – (1) Notwithstanding any rule of court to the contrary, no document, other than a record of an order, held by the court and relating to proceedings to which this Part applies shall be disclosed, other than to –

- (a) a party,
- (b) the legal representative of a party,
- (c) the guardian ad litem,
- (d) the Legal Aid Department, or
- (e) a welfare officer

without leave of the judge.

(2) An application for leave shall be made in Form C2 setting out the reasons for the request.

(3) Nothing in this rule shall prevent the notification by the court or the proper officer or chief clerk of a direction under Article 56(1) to the authority concerned."

[10] I am satisfied that the reports which are the subject of this application are documents held by the court. They were obtained by direction of the court and contain information which relates directly to the proceedings for public law orders. Both documents therefore fall within the ambit of rule 4.24. The PSNI require the leave of the court before such documents can be disclosed to them. To provide the documents without such permission would be a contempt of court under Section 12(1)(a) of the Administration of Justice Act 1960. The burden is on the PSNI to show that disclosure of the requested documents should be made.

[11] The leading authority on disclosure to third parties from family proceedings is the English Court of Appeal decision of *Re EC (Disclosure of Material)* [1996] 2 FLR 725. This was a decision relating to the disclosure of material from care proceedings to the police. It related however to a rather different statutory provision, being section 98(2) of the Children Act 1989. That section provides that no one should be excused from giving evidence on the ground that it may incriminate him or her of an offence. It further provides that a statement of admission made in proceedings shall not be admissible in evidence against the person making it in proceedings for an offence other than perjury.

[12] In that case, before evidence was given by family members, the judge warned each of them that anything said in the witness box could not be used in any criminal trial relating to the death of a young baby from alleged non-accidental injuries. In the course of the hearing the father admitted throwing the baby on to a sofa prior to the ambulance being called. The police were informed by the local authority of the father's admission and applied under rule 4.23 of the family proceedings rules 1981 (the equivalent of our rule 4.24) for disclosure of the statements made in proceedings, the evidence and reports of the doctors in the proceedings and portions of the transcript of evidence.

[13] The court at first instance concluded that the balance between the public interest in encouraging frankness in children's proceedings and the public interest in the proper investigation and prevention of crime would properly be struck by releasing only the medical evidence and the transcripts of the medical witnesses' evidence. The court refused to release the statements made by the parents or any part of their evidence. On appeal the Court of Appeal held that the relevant statutory provision did not preclude disclosure to assist the police enquiry into the

commission of an offence. The Court of Appeal said that the lower court should have ordered disclosure to the police of all the material requested by them.

[14] The focus of the court was on the particular tension created by the issues arising under section 98(2) of the Children Act. The analysis of the factors the court should take into account are still relevant to the issues of disclosure which need to be decided in this case.

[15] In *Re EC* Lord Justice Swinton Thomas stated:

"In the light of the authorities the following are among the matters which a judge will consider when deciding whether to order disclosure. It is impossible to place them in any order of importance because the importance of each of the various factors will inevitably vary very much from case to case:

(1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor.

(2) The welfare and interests of other children generally.

(3) The maintenance of confidentiality in children cases.

(4) The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which section 98(2) applies. The underlying purpose of section 98 is to encourage people to tell the truth in cases concerning children, and the incentive is that any admission will not be admissible in evidence in a criminal trial. Consequently, it is important in this case. However, the added incentive of guaranteed confidentiality is not given by the words of the section and cannot be given.

(5) The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice.

(6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the PSNI which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.

(7) The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order.

(8) The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the PSNI service, medical practitioners, health visitors, schools, etc. This is particularly important in cases concerning children.

(9) In a case to which section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.

(10) Any other material disclosure which has already taken place.”

[16] In England and Wales the authorities have taken note of the subsequent incorporation into UK law of the European Convention for the Protection of Human Rights, together with the introduction of new rules of procedure. The court must consider the balancing of the Convention rights of any of the parties, particularly under Article 6 and Article 8 of ECHR, when deciding issues of disclosure. The cloak of confidentiality surrounding care proceedings in that jurisdiction has been lifted significantly since *Re EC* was decided.

[17] In this jurisdiction the authority of *Re EC* was considered by Mr Justice Gillen in the case of *Re A* (Disclosure to Third Party) [2003] NIFam 5.

[18] In that case, after setting out some of the factors listed in *Re EC*, Mr Justice Gillen went on to say:

[17] In addition, as I indicated in Re L (Disclosure to Third Party) (Unreported: GILC3791), interdisciplinary and interagency work is an essential process in the task of attempting to protect children from abuse. There must be free exchange so far as possible between agencies in order to facilitate that work and protect children. This requires the sharing and exchange of relevant information between social workers of different areas. I regard child protection teams as an important component of interagency work to protect children.

[18] In deciding whether or not to grant permission for disclosure to third parties, the court has to exercise its discretion, in the process of which it has to carry out a balancing exercise of competing rights and interests. There must be real and cogent evidence of a pressing need for the requested disclosure to third parties."

[19] He also considered the impact of Article 8 of the European Convention on Human Rights. Reminding himself that the rights conferred under Article 8 are qualified rights he went on to say in paragraph 19:

"Disclosure of the type now sought is permissible if, but only if, there is "a pressing need" and if necessary checks and safeguards are applied. The second component is that the interference must be in pursuit of one of the legitimate aims identified in Article 8(2) as to which the protection of health and morals and the rights and freedoms of others clearly covers the interests of C in this case. The third component is that the state's interference must be "necessary in a democratic society", which means that it must meet a pressing social need and be proportionate to such needs. The more drastic the interference, the greater must be the need for it. (See Re C (Sexual Abuse: disclosure to landlords) [2002] 2 FCR 409. In short, all rights within the family are qualified and liable to be displaced by the rights and interests of other members of the family. The human rights pursuant to the European Convention on Human Rights, despite their fundamental nature, are no different in this respect."

Discussion

[20] I am satisfied that the factors set out by Lord Justice Swinton Thomas in *Re EC* are a useful guideline in any case considering disclosure of documents in care

proceedings to a third party. The list is not exhaustive or exclusive nor is it ranked in order of importance.

[21] In this matter S continues to receive assistance from the Child Care Centre. The PSNI and parties have accepted that he is unable to speak to the PSNI at this time to complete either a PIA or ABE interview. This is significant in terms of evidence gathering. At an investigative stage of any criminal allegation it is important to be able to interview witnesses, including the alleged victim of a crime. In cases involving children, guidance has been produced to allow such vulnerable witnesses to give their best possible evidence. Investigators will first conduct a multi-disciplinary pre-interview assessment (PIA) with a child to ensure the individual circumstances of the child are taken into account in providing support to enable the child to give their best evidence. The gathering and giving of evidence, if considered appropriate, is then conducted through a controlled, videoed interview commonly known as an ABE (achieving best evidence) interview. As it could be some time before S is able to participate in such a process the PSNI wish to eliminate any delay and make progress with their investigation.

[22] Without knowing the precise contents of the report the PSNI believe the information in the report would both inform and assist their lines of enquiry. They were encouraged in this view by Trust professionals, who informed PSNI that the material could assist them. S has made further allegations in his ongoing work with the Child Care Centre. This work is outside any existing family court proceedings and no court authority was required by the PSNI to obtain any information currently from the Child Care Centre. These new allegations relate to inter-sibling sex abuse and neglect of the children. In light of these further allegations the PSNI maintained that it was appropriate to release the entirety of the Child Care Centre report held by the Court.

[23] It is an inevitable consequence of the latest allegations that the PSNI will now look at wider lines of enquiry. The PSNI characterised the situation as evolving and fluid. It submitted that the confidentiality of the document was outweighed by the public interest in the effective investigation of potential criminal activity. The argument for disclosure was only emphasised where children themselves were involved and their interests were best served in having all issues properly addressed.

[24] The Trust and the Guardian shared a common view. Whilst previously satisfied that a redacted form of the report was sufficient, they considered that the fresh allegations made by S within the Child Care Centre altered the landscape and that there was a broader remit to the PSNI application. All of the professionals involved shared a duty to reasonably investigate allegations made by children. These new lines of enquiry may take the PSNI towards or away from any potential prosecution.

[25] The mother, in common with the other parties, raised no objection to the extracts from Dr Grey's report being provided to the PSNI. However, she did not support the release of the unredacted Child Care Centre report. She argued that as the main thrust of the PSNI investigation concerned X, a redacted copy of the report relating only to X was sufficient. The PSNI had not provided details of the latest allegations made by S in the Child Care Centre. It was unclear what purpose the report may be used for and no PSNI interviews had taken place with S. She maintained that the PSNI application was a trawling exercise and an attempt to substitute the report for the proper attainment of best evidence in accordance with criminal procedure. The information contained in the Child Care Centre report was the result of work which was not conducted in a manner that envisaged potential criminal proceedings. The court should limit its consideration of materials to those concerning X. It was open to the PSNI to bring a further application in due course in relation to the latest allegations made by S.

[26] The father's position was substantively in line with the mother's. The PSNI application was lodged in July 2018. The initial alleged disclosures made by S occurred up to May 2018. The father supported the position that information in respect of X should be disclosed but contended that that was where the appropriate balance lay. If the PSNI sought further disclosure then to ensure fairness between the parties a further application could be brought in due course. The father submitted that it was better to deal with the disclosure issues in measured steps.

[27] The parents argued that they were entitled to know the full scope of any investigation the PSNI proposed to pursue before the release of any material. This should include the full details of any allegations now made by S. I am satisfied that there is a false logic in this position. It prioritises the interests of the parties over those of the child. Those who are the potential subjects of a criminal investigation are not ordinarily entitled to know what investigative steps the PSNI have taken or are proposing to take. If an individual is to be interviewed, he or she is entitled to know sufficient details of the charges they face to allow their interview to be meaningful and to ensure their own rights are protected. The PSNI investigation at this point falls far short of that stage. S is unlikely to be able to complete any interview as part of the investigation for some considerable time.

[28] The parents also argue that the disclosure of the report should not be a substitute for the obtaining of best evidence. However, it is clear that the PSNI intend to seek evidence directly from S and the fact that this has not yet been obtained does not in my view create any barrier to their application for disclosure in this case.

[29] Whilst confidentiality is important in proceedings involving children, it is not an absolute right. There is a balancing exercise to be carried out between the importance of confidentiality in family proceedings and the public interest in the administration of justice by a proper investigation of potential criminal matters. This is not a case where admissions have been made or evidence given by an individual

such as may have been envisaged by section 98(2) of the English legislation (and which was the focus in *Re EC*). This is not a case of self-incrimination. Allegations have been made by one of the children of the family. They involve not just X but also the parents and others. The disclosure requested is not for publication to the world at large. It is a request for disclosure to professionals involved in the investigation of alleged serious criminal offending, to enable them to conduct appropriate enquiries and follow possible avenues of investigation. There is implicit in the application an acknowledgement of the confidential nature of the material. Disclosure is sought for an identified group of professionals and for an identified purpose. I am satisfied that, with appropriate safeguards, a proportionate order can be made.

[30] The parents have provided their suggestions for redaction of the report. It is certainly open to the court to place restrictions on the information to be disclosed and also the use to which that information can be put.

[31] There is a clear public interest in the efficient and fair administration of justice. It is desirable that the various agencies involved in the care and safety of children should cooperate as far as possible. The PSNI and the Trust work together towards the safeguarding of children. Co-operation should take place as early as possible. This principle underpins the existing arrangements for co-operation under the Protocol for Joint Investigation by Social Workers and PSNI Officers of Alleged and Suspected Cases of Child Abuse - Northern Ireland. The protocol emphasises the obligation on PSNI and Social Services to take reasonable action within their powers to safeguard the rights of children. It acknowledges in its foreword the growth in knowledge and understanding of child abuse in recent decades and the expectation of society that those agencies should react positively to critical events. This co-operation is crucial in ensuring the maximum protection is available for children. The exchange of relevant information is an important aspect in ensuring the welfare of children and their ongoing protection.

[32] There is no doubt that attitudes in society have changed considerably since the decision in *Re EC*. The Human Rights Act 1998 has come into force and there are increasing calls for greater transparency in court proceedings, including the family court. In England and Wales this change is reflected by the development of the equivalent Rules of Procedure, which now provide for various circumstances in which information can be released in family court proceedings without the need for a further court order. Proportionality and the balancing of differing, and competing, Article 8 rights must be considered in this context. The court must determine if disclosure meets "a pressing social need and be proportionate to such needs." (per Gillen J in *Re A*, para. 19)

[33] There is a strong public interest in ensuring that any material which may be relevant to a criminal investigation is not withheld from the PSNI unless there are good grounds for doing so. In considering this aspect I take into account the gravity

of the alleged offending and the relevance of the evidence. The Child Care Centre report contains allegations made by an alleged victim.

Conclusion

[34] I have considered the contents of Dr Grey's report and the redactions proposed by the parties. Dealing with that matter first, I am satisfied that it is appropriate to release the redacted report to the PSNI. The parties to the original care proceedings all agree with this approach. The PSNI do not seek any further disclosure in relation to Dr Grey's report at this time.

[35] I have also considered the contents of the Child Care Centre report along with the redactions to the report proposed by the parents. There is no objection to the release of material per se to the PSNI. The real dispute is on the extent of such disclosure.

[36] I am satisfied that the PSNI should be able to carry out a full and proper investigation of the allegations made by the children in this case. The PSNI say that because further information has become available the scope of their enquiry may be wider than first envisaged. That is both entirely proper and unexceptional. It is not unusual that PSNI enquiries will take them in different directions in order to satisfy their duties and responsibilities both to alleged victims and also to alleged perpetrators. In this case I can see no reason why the PSNI should not be conducting their enquiries with full and accurate information available to them.

[37] I am satisfied that there is no need to limit consideration of materials to those involving only X. Whilst the focus may originally have been on X to the exclusion of any others, there is no reason to fetter a proper investigation which is based on all of the information now available. Any disclosure made by this court is still in the context of these proceedings in which the children's welfare is the paramount consideration and not the personal interests of affected parties.

[38] I am further satisfied that a phased disclosure is neither necessary nor appropriate. The children continue to have their own relationships with parents and siblings. Delay brings disruption and potentially negatively impacts on the children generally and on S particularly. It is in the best interests of the children to avoid delay and I do not consider that any possible prejudice to the affected parties, in light of all the safeguards available, outweighs the detriment of such delay.

[39] Whilst the parties have made their representations about the release of the material, X has not had that opportunity. I am satisfied there is no need to grant X any intervenor or third party status. No decisions are being made in relation to X and the context of the consideration by the court of the release of documents is the welfare of the children. I am satisfied that the release of the documents is overwhelmingly in the best interests of the children and a protection of their Article 8 rights.

[40] In considering the various convention rights in play in this matter I have had regard to both Article 6 and Article 8 of the ECHR. All of the affected parties, including the children, have the right under Article 8 to respect for their private life. Any interference with that right, which includes the disclosure of confidential information concerning them, must be necessary and proportionate. Article 8 expressly recognises that interference with that right may be necessary and proportionate in the interests, inter alia, of the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. I am satisfied that any interference with the Article 8 rights of any of the parties in this case or any third parties is both necessary and proportionate. I am satisfied that there is a pressing need for disclosure.

[41] Article 6 of the Convention guarantees the right to a fair trial. This is an absolute right as contrasted with Article 8 which is a qualified right. All of the parties have rights under Article 6 including the children. I am satisfied any Article 6 rights, if engaged, point towards disclosure as any disclosed material can then be properly tested. I am concerned in this application with deciding if there should be disclosure from the family court to the proper authorities within the criminal justice system. It is not my task to seek to evaluate the strength or otherwise of the matters involved in the PSNI investigation. The criminal justice system itself provides appropriate safeguards against unfair procedures. I am satisfied there is no breach of any Article 6 rights if disclosure is made.

[42] I am satisfied that none of the children involved in these proceedings will be adversely affected by an order for disclosure. I am satisfied that there is no benefit to S or any of the children in withholding the material. Refusal to disclose the nature of the allegations S made to the Child Care Centre may ultimately be harmful to him if it prevents or delays a proper investigation of those allegations.

[43] It was argued that the Child Care Centre report was information obtained as a result of work which did not envisage potential criminal proceedings. There were 10 sessions conducted with the children, the first of which was introductory and two of which were therapeutic in nature. I accept that this is different to an interview conducted with a child in a process expressly focussed on obtaining evidence for use in criminal proceedings. At this time it is unclear precisely what approach was taken by the Child Care Centre in working with the children. Some of it is clearly therapeutic. There may well be the possibility that the child was led to an answer, or that an answer was misinterpreted by the listener. These points may become relevant issues should the disclosed material be sought to be introduced into evidence at some point in criminal or other proceedings. Any individual's article 6 rights will be protected by a proper consideration of the admissibility of that evidence into those proceedings at that time. I do not consider that any potential limitations on the admissibility of evidence in other proceedings should prevent it being released to the PSNI now to assist in the investigative process.

[44] It is also worth noting that the Child Care Centre report itself has a preamble which states:

"The PSNI have advised the Child Care Centre of an ongoing criminal investigation regarding these children. The PSNI have indicated that information contained within this report will contribute to this investigation. They may seek leave of the court for disclosure of this report. As such the court may wish to consider when and to whom this report is released."

[45] It is therefore clear that the authors of the report were well aware of the PSNI interest before the report was completed. The criminal justice system has its own powers and safeguards to protect the individual rights of those involved. The fact that material is disclosed to the PSNI or PPS does not automatically mean it becomes admissible in any criminal proceedings.

[46] In my judgement the balance in this case clearly falls in favour of disclosure of the entire Child Care Centre report to the PSNI. As public bodies, both PSNI and PPS will remain under a duty to protect the rights to confidentiality of all of those concerned under Articles 6 and 8 of the ECHR and section 6 of the Human Rights Act 1998. I am satisfied that the disclosed documents should be used only for the purposes of advancing the PSNI investigation. The documents can also be made available to the appropriate individual, if any, considering the matter in the PPS and used for the purposes of any charging decision. I consider this Order is proportionate and meets a pressing social need. It meets the balance of confidentiality and the public interest in the prevention and investigation of crime. It will allow the PSNI to progress their investigation in an informed and effective manner and protects the welfare of the children concerned.